2013 IL App (1st) 120039-U

FIFTH DIVISION
December 20, 2013

No. 1-12-0039

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Cook County
Plaintiff-Appellee,	)	
	)	
v.	)	10 CR 16869
	)	
DANIEL ACOSTA,	)	Honorable
	)	Stanley J. Sacks,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Justices Palmer and Taylor concurred in the judgment.

O R D E R

¶ 1 HELD: (1) Where the evidence showed that exigent circumstances existed to allow police to enter defendant's home without a warrant and where the evidence presented against defendant at trial was overwhelming, defendant was unable to show his counsel was ineffective for failing to file a motion to quash his arrest and suppress evidence; (2) Where defendant committed a violent crime in front of eyewitnesses only three days prior, the trial court did not err in admitting evidence of his flight from the police to show consciousness of guilt; and (3) Where there is not a "clear basis" on the record to show defendant received ineffective assistance of counsel, and defendant made no *pro se* claim of ineffectiveness before the circuit court, the court acted properly in not conducting a *Krankel* inquiry.

¶ 2 After a bench trial, defendant Daniel Acosta was found guilty of attempted first degree murder and sentenced to 22 years in prison. On appeal, defendant contends that: (1) his trial counsel was ineffective for failing to file a motion to quash the arrest and suppress evidence; (2) the circuit court erred by admitting evidence of defendant's attempted flight to show a consciousness of guilt; and (3) the circuit court erred in failing to hold a preliminary *Krankel* inquiry regarding trial counsel's ineffectiveness for failing to call a potential alibi witness. For the following reasons, we affirm.

¶ 3 Defendant and codefendant Javier Perez, who is not a party to this appeal, were charged with attempted first degree murder and multiple counts of aggravated battery based on the August 23, 2010, beating and stabbing of Brian Jotzat. Defendant and Perez had simultaneous but severed trials, with defendant opting for a bench trial and Perez opting for a jury trial.

¶ 4 At trial, Antonio Treadway testified that on August 23, 2010, he had been playing basketball with Brian Jotzat, Jose Lazo, and Giovanni Hernandez at Horner Park near the intersection of Irving Park Road and California Avenue. At about 8 p.m., they were walking home, going eastbound on the north side of Irving Park, when a four-door, green car drove by heading west on Irving Park. The occupants of the car "started throwing gang signs;" specifically a hand sign in the shape of a crown, which Treadway recognized as a sign representing the Latin Kings. The car continued westbound on Irving Park, but before it reached California, the car made a u-turn and then drove back to where Treadway and his friends were walking. The car stopped on the opposite side of the street and Treadway saw two men exit the car. One was wearing a white sleeveless undershirt. The other, wearing a polo shirt, was eventually identified

by Treadway in open court as defendant. The man in the sleeveless shirt approached Treadway and his friends, while defendant stayed just behind. Treadway said that the two men were "gang banging" and he tried to "defuse the whole situation" by telling the two men that he and his friends did not "gang bang." The man in the sleeveless shirt said he was a Latin King, so Treadway said one of Treadway's family members was a member of the Latin Kings. Soon, the two men returned to their car. Lazo and Hernandez then crossed the street to the north side of Irving Park, heading for Horner Park. They drove five or ten feet away then stopped and exited the car again. Treadway saw defendant take a baseball bat from the trunk of the car. As the man in the sleeveless shirt came out of the car, he pulled a knife from his waistband while "rushing" toward Treadway. The man in the sleeveless shirt started swinging the knife at Treadway and grazed Treadway's right arm. The man in the sleeveless shirt then ran toward Jotzat, who was about five feet behind Treadway. Treadway turned toward Jotzat, and saw defendant behind Jotzat. Treadway was about five to ten feet away from defendant and had a clear view of defendant. Then Treadway saw defendant hit Jotzat in the back of the head with the bat and heard a loud crack. Defendant swung the bat with both arms, with "full force" and "momentum." Jotzat instantly fell to the ground, then the man in the sleeveless shirt stabbed Jotzat in the chest. Both men ran back to the car and drove away, eastbound on Irving Park. Treadway stayed with Jotzat, who was nonresponsive. Treadway testified that while Jotzat was lying on the ground, he was "shaking violently" and "foaming by the mouth like he was going through a seizure." Eventually, an ambulance took Jotzat away. Treadway spoke to police at the scene.

¶ 5 The following day, at about 11:45 p.m. on August 24, 2010, Treadway met with police to

view a photo array. He read and signed a photo array advisory form, stating that he understood the suspect may or may not be in the lineup and that he was not required to make an identification. From the photographs the police showed him, Treadway identified defendant as the man who hit Jotzat in the head with a bat. He also identified another photograph as the man in the sleeveless shirt.

¶ 6 On August 27, at about 6 p.m., Treadway went to the police station to view an in-person lineup. Before viewing the lineup, he read and signed an advisory form. Treadway identified defendant in the lineup as the man with the bat, but was unable to identify the man in the sleeveless shirt.

¶ 7 On cross-examination, Treadway admitted that during his conversation with the man in the sleeveless shirt, his focus was on that man, not defendant. Treadway had noticed one teardrop tattoo on defendant's face, but did not remember seeing tattoos on defendant's arms. The second time the two men exited the car, Treadway's attention was on the man in the sleeveless shirt, but he also saw defendant retrieve the bat from the trunk of the car. When the man in the sleeveless shirt rushed at Treadway with the knife, Treadway's view of defendant was obstructed. However, nothing was blocking Treadway's view of defendant when Treadway saw defendant hit Jotzat in the head with the bat.

¶ 8 Jose Lazo testified that at about 8 p.m. on August 23, 2010, he and his friends were walking home from Horner Park, heading east on the north side of Irving Park Road. At some point, Lazo crossed to the south side of the street and then saw that Jotzat, Treadway, and Hernandez were running toward him. Lazo noticed a dark green or black, four-door sedan make

a u-turn on Irving Park so it was heading east, then stopped about 20 or 30 feet away from Lazo. Two men exited the car, one wearing a polo, eventually identified by Lazo in open court as defendant, and the other wearing a sleeveless undershirt. The man wearing the sleeveless shirt ran toward Lazo, Hernandez, and Jotzat, while the man in the polo ran toward Treadway. Treadway and defendant were "in each other [*sic*] faces," arguing, although Lazo did not hear what was being said. Lazo did see defendant "[throw] up the crown" and heard defendant say "King love." Lazo noticed the man in the sleeveless shirt fidgeting inside his shirt, and saw a white handle, which Lazo assumed was "maybe a shank or something." The two men stood where they were for "about two minutes" then walked back to their car. Lazo and Hernandez then crossed back to the north side of the street while Treadway and Jotzat kept walking on the south side of Irving Park. Ten seconds later, when Lazo was back in Horner Park, he heard a "loud crack like it was someone hitting a baseball like with a bat." He looked toward the street, and saw the same two men from before running to their car, then driving away. Defendant was holding a bat as he ran. Lazo did not see anyone hit or stab Jotzat, but after he saw the men running away, he ran to Jotzat. Jotzat was shaking "unnaturally," "foaming at the mouth, and his head was leaking." Lazo spoke with the police that night at the scene.

¶ 9 On August 24, 2010, Lazo was shown several sheets of photographs by police. After signing a photo array advisory form, he identified defendant as the man he had seen with the bat.

¶ 10 On cross-examination, Lazo testified that he separated himself from his friends to "keep a low profile," and he did not notice the car until after he had crossed to the south side of the street. Lazo noticed defendant had teardrop tattoos on his face, but did not notice any tattoos on

defendant's arms. Lazo could not recall whether he told Detective Olson about defendant's teardrop tattoos. Lazo looked at defendant for "a good 4 seconds" before turning toward the man in the sleeveless shirt. Lazo had focused on the man in the sleeveless shirt because he thought he had seen that man with a blade and Lazo was concerned for his own safety. Lazo also admitted that he had never viewed an in-person lineup because he went to Wisconsin for three or four days after he viewed the photographs.

¶ 11 Luis Ortega testified that at approximately 8 p.m. on August 23, 2010, he was driving westbound on Irving Park Road with his wife and children, when three people jumped in front of his car and crossed from the north side to the south side of Irving Park. Ortega stopped his car and observed a four-door green Ford Taurus parked on his right-hand side. The driver's side door was open and a man wearing a dark-colored, short-sleeved shirt was standing outside the vehicle with a bat in his hand, about 10 feet away from Ortega. Ortega made a u-turn and parked in a condominium entranceway on the south side of Irving Park, then saw the man in the dark-colored shirt get into the green Ford. The Ford also made a u-turn on Irving Park and came to a stop about half-a-block from Ortega. Ortega saw "people running after another guy, one guy running, 2 guys run behind the other one." At that point, Ortega was scared for his family, so he told his wife to write down the license plate number of the Ford, and dictated two numbers to her "because it was so quick, [he] couldn't get the whole number." He then turned west onto Irving Park and drove away. Later that night, Ortega drove past the same area and noticed a number of police cars, so he gave the police the license plate numbers that his wife had written down.

¶ 12 On cross-examination, Ortega said he was never shown a photo array, and was unable to

identify anyone in the in-person lineup.

¶ 13 Giovanni Hernandez testified that at about 8 p.m. on August 23, 2010, he and his friends were walking home on the north side of Irving Park Road when he noticed a four-door, dark-colored, green or black car driving past them. The car occupants were "throwing up the crown" and he heard someone yell "King love." After the car passed, Lazo crossed to the south side of the street. Hernandez then saw the car stop and three individuals exit the car, one just moving from the back seat to the driver's seat. The other two men, one in a sleeveless white shirt and one in a dark polo, ran toward Lazo, so Hernandez, Jotzat, and Treadway ran across the street to join Lazo. The man in the sleeveless shirt exchanged words with Treadway while the man in the polo just lingered nearby. The man in the sleeveless undershirt had his hand under his shirt, "[k]ind of like he was concealing something." The green car eventually made a u-turn on Irving Park so it was facing east bound. At some point, Hernandez followed Lazo back to the north side of the street and into Horner Park. Treadway was still talking to the man in the sleeveless shirt, but "it happened really fast, a split second, he started running behind us, too, cause the individual in the white shirt started pursuing all of us." Hernandez ran into the park, but turned around when he was about five feet in, and saw Treadway about two or three feet from the park entrance. The man in the sleeveless shirt was next to Treadway, and Treadway had his hands up in "defense mode." Then the man in the sleeveless shirt went east and Hernandez heard a cracking sound. Hernandez looked in the direction of the sound and saw Jotzat lying on his side on the ground. The man in the polo appeared as though he had "just got done hitting [Jotzat] cause he was catching himself from I guess the force he put into swinging at him." The man in the sleeveless

shirt then ran at and stabbed Jotzat in the chest with what "looked like a pocket knife." The men ran off and Hernandez ran to Jotzat, whose eyes were fluttering. Jotzat was shaking and unresponsive to Hernandez.

¶ 14 On cross-examination, Hernandez testified that both men had tattoos, though he could not describe the tattoos in detail. In regard to the man in the polo, he did not remember seeing any facial teardrop tattoos or any tattoos on the right forearm. He "did see a tattoo I want to say on his left forearm maybe." Hernandez spoke to a detective on August 23 and gave the detective a description of the individuals, but could not remember if he told the detective the men had tattoos. Hernandez was unable to identify anyone in a photo array or an in-person lineup.

¶ 15 Brian Jotzat corroborated that at about 8 p.m. on August 23, 2010, he was walking home from Horner Park with his friends. Jotzat did not remember much from that night, but he remembered walking on Irving Park Road and some individuals exiting a car. He did not remember getting hit in the head with a baseball bat or getting stabbed in the chest. Jotzat eventually woke up in the hospital with injuries he did not have before August 23, 2010. When he woke up, his entire left side was paralyzed and he had a head injury. He could not walk. He was lying in a hospital bed and "tubes were coming out of my head, out of my mouth and I was just, really I couldn't move at all." Jotzat underwent multiple surgeries and eventually had a plate put in his head. He was in the hospital for between two and three months and he had to go through physical therapy. Jotzat still experiences headaches as a result of his injury, "occasionally real [*sic*] bad," he still has paralysis in his left foot, and he also has memory problems. He continues to take an anti-seizure medication, a medication for his muscle spasms, and a sleeping pill,

without which he would not be able to sleep at night.

¶ 16 Deborah Sommer, a paramedic for the Chicago Fire Department, testified that at about 8 p.m. on August 23, 2010, she and her partner responded to a call of a stabbing. Upon her arrival, Sommer observed Jotzat lying on the sidewalk. She learned that he had been "beaten in the head with a baseball bat." Jotzat was not responsive. Sommer cut off Jotzat's t-shirt, which had a blood stain in the middle of the chest, and saw a stab wound through the center of Jotzat's chest, on the sternum. When Sommer and her partner finally loaded Jotzat onto the ambulance, she noticed that the left side of his body was not responding. Jotzat was bleeding from the back of his head, his left ear, and from his nose. Although he was breathing on his own, it was "totally inadequate and it was irregular," so Sommer started breathing for him with a bag, faster and more rhythmically. Jotzat was taken to Illinois Masonic Medical Center.

¶ 17 Doctor Rebeca Rico, a trauma critical care surgeon and expert at Illinois Masonic Medical Center and Lutheran General Hospital, testified that on August 23, 2010, she saw Jotzat when he arrived at the hospital. He was unresponsive, in a coma, and unable to breathe on his own. He had a stab wound in the chest. His pupils were unequal, dilated, and not responding. Either blood or cerebral spinal fluid was coming out of Jotzat's ear. A CAT scan showed that Jotzat had a "subdural hematoma," or a blood clot "which was pushing on the brain." There was also evidence of "herniation" of the bottom part of the brain, and fractures on his skull. Rico determined that Jotzat was in critical condition. She explained that if pressure in the brain is not relieved, "the patient can essentially go brain dead. You have no blood flow to the brain and all the cells in your brain dies [*sic*]." Within 30 minutes, Jotzat was taken to an operating room for a cranietomy,

where a piece of the bone was removed form Jotzat's head to alleviate the pressure. Jotzat's injuries were consistent with him having been hit in the head with a blunt object such as a bat.

¶ 18 Detective Michael Landando testified that on August 23, 2010, he was assigned to investigate Jotzat's case. He arrived on the scene after Jotzat had already been taken to the hospital. Landando went to the hospital to check on Jotzat's condition, but he was unable to speak with Jotzat because Jotzat was being worked on. Landando was informed that Jotzat "was going to be put into a coma to try to reduce the swelling on his brain." On August 26, 2010, Landando received information that defendant was a possible offender. Landando went to defendant's apartment that same day, at about 10:45 p.m, and knocked on the door, accompanied by another detective and a sergeant. When defendant answered, Landando introduced himself and said, "Dan, we're Chicago police detectives, we'd like to talk to you." Defendant slammed the door shut and locked it. Then, Landando heard "a bunch of little kids in there screaming and yelling" and "large objects moving around in the apartment." The officers forced their way into the apartment and found defendant hiding behind the couch in the first room they entered. Defendant was arrested and taken to the police station.

¶ 19 Landando also testified that two witnesses, Luis Ortega and his wife, had provided detectives with a possible license plate number for a vehicle that had been described as a green Ford Taurus, which the offenders may have used. Ortega was sure the car he had seen was a green Ford Taurus. The license plate number the Ortegas provided did not match any Ford Taurus, but after trying various permutations of the provided numbers, a search resulted in a green Ford Taurus that was registered to codefendant. Landando went to codefendant's residence at

about 2:45 a.m. on August 27, 2010, and observed a vehicle matching the description of the green Ford Taurus parked directly across the street from the residence. Codefendant answered the door, and Landando identified himself as a Chicago police detective. Ultimately, codefendant was arrested.

¶ 20 On cross-examination, Landando testified that he noticed defendant had tattoos but did not recall if defendant had tattoos on his arms. At trial, Landando observed in open court that defendant had two teardrop tattoos on the left side of his face, and one on the right side. When Landando knocked on defendant's door, he did not tell defendant why they were there because he did not get the opportunity.

¶ 21 Detective Keith Olson testified that at approximately 8 p.m. on August 23, 2010, he received an assignment and reported to Irving Park and California. Detective Olson spoke to witnesses on the scene, including Luis Ortega, from whom Olson received information about a license plate number. Olson created a photo array of Latin Kings in the area where the crime was committed with the assistance of an area police officer. At approximately 9:45 p.m. on August 24, 2010, Olson met with Jose Lazo and showed him the photo array. Lazo identified defendant as the man who struck Jotzat in the head with a baseball bat. At approximately 11 p.m., Olson showed the photo array to Giovanni Hernandez, who was unable to make any identification. At about 11:45 p.m., Olson met Antonio Treadway and showed him a photo array. Treadway identified defendant in the photo array as the individual who struck Jotzat in with a bat. Treadway also identified a man named Binino Flores as the man that had stabbed Jotzat. However, Olson's investigation revealed Binino Flores was not involved in the beating or stabbing of Jotzat.

¶ 22 On August 27, 2010, at about 5:57 p.m., Treadway viewed a lineup which contained both defendant and codefendant. Treadway identified defendant but was unable to identify codefendant. Luis Ortega also viewed the lineup but was unable to make any identification. Lazo was out of town at the time of the lineup.

¶ 23 On cross-examination, Olson testified that he spoke with Lazo at about 9:39 p.m. on August 23, 2010. The State stipulated to the fact that Lazo did not mention any tattoos to Olson. Olson spoke to Treadway at about 9:54 p.m. that night but Olson did not document any mention from Treadway about defendant having tattoos in his report. Olson said that Treadway identified defendant out of a group of photographs. Olson also spoke to Hernandez on the night of the attack, and Hernandez gave Olson a description of the man in the polo, but did not mention whether the man in the polo had any tattoos.

¶ 24 After the State rested, defense counsel moved for a judgment of acquittal, which the court denied. Defendant declined to testify on his own behalf and did not present any other evidence.

¶ 25 In closing argument, defense counsel focused on the insufficiencies of the identifications. He emphasized that the man seen hitting Jotzat in the head with a bat was wearing a short-sleeved shirt and that, despite defendant having "large tattoos on his right and left forearms" as well as one teardrop tattoo on the right side of his face and two on the left side, Detective Olson did not indicate on any of his reports that a witness described the man in the polo as having any tattoos. Counsel also pointed out that although Treadway spent most of the incident talking to Perez, he was only able to identify defendant and was unable to correctly identify Perez, and that Lazo was never brought in to view a physical lineup.

¶ 26 After closing arguments, the court discussed the evidence from the trial, beginning with Treadway and Lazo's photo array identification and Treadway's misidentification of codefendant. The court emphasized that Treadway and Lazo independently identified defendant from the photo array. In regard to defense counsel's argument about defendant's tattoos, the court said the witnesses "maybe missed something about a teardrop tattoo or tattoos, maybe they might have missed it. I think one or more of them said, though, we thought we told the police about the tattoos. Maybe they thought they did, maybe they didn't tell them. Overall it doesn't matter about the tattoos." The court went on to say:

> "[T]he evidence of consciousness of guilt corroborates what the witnesses said. The police knock on the door, [defendant] answers the door, whack, slams the door, locks the door, hides behind the couch to avoid getting arrested or getting caught by the police for reasonably in this case, what he knew he had done a few nights before. Otherwise, why go through all that trouble to get away from the police, for what reason? None.
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> [The finding of guilt] is based solely on the evidence I talked about today, identification by Lazo, identification by Treadway, and the evidence is significant, consciousness of guilt on [defendant's] part when he tries his best to avoid the police."

¶ 27 The court ultimately found defendant guilty of attempted murder.

¶ 28 On December 2, 2011, defendant filed a motion for new trial. On December 8, 2011, the court held a hearing on the motion. Defense counsel argued that it was error for the court to consider defendant's flight as evidence of defendant's consciousness of guilt because defendant attempted to flee three days after the actual incident occurred, and there was no evidence to support that defendant knew why the police were at his apartment. The court denied the motion.

¶ 29 The court also held the sentencing hearing on December 8, 2011. The court indicated it had received a total of 10 letters from defense counsel, and had read all the letters. One letter, from defendant's sister, read in pertinent part, defendant "was at home the day of the incident that he is being accused of, but due to the circumstances and the fact of his background and a police officer even on oath stating different of what really happened on the day of the arrest, makes my brother look like a bad guy and the one that did the crime." The circuit court sentenced defendant to 22 years in prison.

¶ 30 On appeal, defendant first contends that his trial counsel was ineffective for failing to file a motion to quash the arrest and suppress evidence. The only evidence defendant argues should have been suppressed as "fruit" of the unlawful arrest is the testimony that he was found hiding behind a couch when he was arrested. Defendant concludes that the motion to suppress would have had a reasonable probability of success and that, had it succeeded, and the evidence of his "flight" had been suppressed, the trial outcome would have been different.

¶ 31 To prevail on a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance was deficient and that he was prejudiced by the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Counsel's performance is considered

deficient if " 'counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment.' " *People v. Cooper*, 2013 IL App (1st) 113030, ¶ 53 (quoting *Strickland*, 466 U.S. at 687). "Only if counsel's trial strategy is so unsound that he entirely fails to conduct meaningful adversarial testing of the State's case will ineffective assistance of counsel be found." *People v. Perry*, 224 Ill. 2d 312, 355 (2007). In evaluating counsel's performance, the court must therefore consider the totality of the circumstances. *People v. Moore*, 356 Ill. App. 3d 117, 122 (2005). To show prejudice, a defendant must show that but for counsel's actions there is a reasonable probability that the trial outcome would have been different. *Cooper*, 2013 IL App (1st) 113030, ¶ 12. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. If the defendant fails to show either prong of the *Strickland test*, his claim will fail. *People v. Manning*, 334 Ill. App. 3d 882, 892 (2002).

¶ 32 Generally, the decision whether to file a motion to suppress is a matter of trial strategy and, therefore, is entitled to great deference. *People v. Martinez*, 348 Ill. App. 3d 521, 537 (2004). Because effective assistance refers to competent, not perfect, representation, mistakes in trial strategy will not, by themselves, render representation incompetent. *People v. Calhoun*, 404 Ill. App. 3d 362, 383 (2010). Both defendant and the State claim that, in order to prove ineffective assistance of counsel based on counsel's failure to file a motion to suppress, a defendant need only show that the motion would have enjoyed a "reasonable probability of success" and that, if granted, "the outcome of the trial would have been different." See *People v. Little*, 322 Ill. App. 3d 607, 613 (2001). However, in May 2013, our supreme court in *People v.*

Henderson, 2013 IL 114040, clarified that a more stringent standard is appropriate, holding that "where an ineffectiveness claim is based on counsel's failure to file a suppression motion, in order to establish prejudice under *Strickland*, the defendant must demonstrate that the unargued suppression motion is meritorious, and that a reasonable probability exists that the trial outcome would have been different had the evidence been suppressed." *Henderson*, 2013 IL 114040, ¶ 15. Following *Henderson*, we first consider whether a motion to quash defendant's arrest and suppress evidence would have been meritorious.

¶ 33 Unreasonable searches and seizures are prohibited by both the United States constitution and the Illinois constitution. U.S. Const., amend. IV; Ill. Const. 1970, art. I, § 6. "The chief evil against which the fourth amendment to the United States Constitution is directed is the physical entry of the home." *People v. Davis*, 398 Ill. App. 3d 940, 948 (2010) (citing *Payton v. New York*, 445 U.S. 573, 585 (1980)). A "firm line" has been drawn at the entrance to the house, and warrantless searches and seizures within the home are presumptively unreasonable. Davis, 398 Ill. App. 3d at 948 (citing *Payton*, 445 U.S. at 586, 590). Therefore, absent exigent circumstances, police may not enter a private home to make a warrantless arrest. *Payton*, 445 U.S. at 590; *People v. Foskey*, 136 Ill. 2d 66, 74 (1990).

¶ 34 In reviewing whether police properly entered into a private residence based on exigent circumstances, each case must be decided based on its own facts; the guiding principle is reasonableness. *Davis*, 398 Ill. App. 3d at 948 (citing *Foskey*, 136 Ill. 2d at 75-76). The state bears the burden of proving that exigent circumstances existed. *Foskey*, 136 Ill. 2d at 75. Some factors that may be considered when determining whether exigent circumstances existed include:

> "(1) whether the offense under investigation was recently committed; (2) whether there was any deliberate or unjustifiable delay by the officers during which time a warrant could have been obtained; (3) whether a grave offense is involved, particularly one of violence; (4) whether the suspect was reasonably believed to be armed; (5) whether the police officers were acting upon a clear showing of probable cause; (6) whether there was a likelihood that the suspect would have escaped if not swiftly apprehended; (7) whether there was a strong reason to believe that the suspect was on the premises; and (8) whether the police entry, though nonconsensual, was made peaceably." *Foskey*, 136 Ill. 2d at 75.

¶ 35 This list is in no way exhaustive and the factors are not meant to be "applied rigidly in each case." *Davis*, 398 Ill. App. 3d at 948. The question is whether the officers acted reasonable based on the totality of the circumstances facing the officers at the time of entry. *Id*.

¶ 36 Here, we find that the factors support the police conduct. First, we find it difficult to hold that the offense being investigated was not recent because defendant's arrest occurred only 72 hours after the crime was committed.

¶ 37 Next, nothing on the record suggests there was any deliberate or unjustifiable delay by the officers. In fact, the detectives' testimony showed diligence in their investigation. Four people were on the scene after the attack: Treadway, Lazo, Hernandez, and Jotzat. In addition, the police were looking for two offenders. Olson spoke with Treadway, Lazo, and Hernandez the day of the

attack. The next evening, Olson showed all three a photo array. Defendant was positively identified by both Treadway and Lazo as one of the offenders the evening after the crime occurred. Olson also testified that he investigated the man Treadway had identified as the other offender, Binino Flores, enough to determine Flores was not involved. Olson spoke to Ortega about the car Ortega had seen and the possible license plate numbers. Landando testified to the search that was required to locate the green Ford Taurus that Ortega had witnessed. Finally, Landando testified that as soon as he received information that defendant was a possible offender, he went to defendant's apartment. Based on the testimony presented at trial, and the record before us, we cannot say there was any deliberate or unjustifiable delay by the police.

¶ 38 The third factor weighs heavily in favor of finding exigent circumstances because, as defendant conceded, the crime was grave and violent. Defendant was seen hitting Jotzat in the back of the head with a baseball bat with "full force" and "momentum," and his codefendant stabbed Jotzat in the chest. As a result, Jotzat suffered paralysis on his left side, underwent multiple surgeries, and required a plate in his head. Defendant argues that the police had no reason to believe defendant was armed at the time of his arrest. However, whether a defendant is reasonably likely to be armed at the time of the arrest can be affected by whether defendant was armed during the commission of the crime. *Williams*, 315 Ill. App. 3d at 40. It is undisputed that the officers were aware that defendant had used a baseball bat to seriously injure Jotzat and that a knife was also used in the attack, which could reasonably be taken into account at the time of his arrest. See *People v. Sakalas*, 85 Ill. App. 3d 59, 66 (1980) ("although the officers had no reason to believe that [the defendant] was armed, they were aware that they were seeking a person who

had used a pipe in a violent beating of another individual").

¶ 39 As to the next factor, defendant concedes that the police arguably had probable cause to arrest defendant based on the photo array identifications of Lazo and Treadway. Probable cause to arrest exists when the totality of the facts and circumstances known to the officer at the time of arrest are sufficient to justify a reasonable belief that the defendant has committed a crime. *People v. Garvin*, 219 Ill. 2d 104, 115 (2006). In the instant case, the police had probable cause to arrest defendant based on two separate photo array identifications from eyewitnesses that defendant was the man who hit Jotzat in the head with a bat.

¶ 40 The sixth factor also weighs in favor of a finding of exigent circumstances. Detective Landando testified that when he arrived at defendant's apartment, he knocked on the door and, when defendant answered, introduced himself by saying, "Dan, we're Chicago police detectives, we'd like to talk to you." In response, defendant slammed the door shut and locked the door, and then Landando heard children screaming and yelling and large objects being moved around within. In these circumstances, the police, having knowledge of the violent crime defendant had perpetrated only a few days prior, could reasonably conclude that defendant was either attempting to flee, hide, or harm someone inside the apartment. Defendant argues "[i]t was the police who prompted a response when they forced their way into [defendant's] apartment." Defendant's argument, however, ignores that the police heard children screaming and yelling and furniture moving before forcing their way into the apartment and, in fact, it could be reasonably inferred that the police forced their way into the apartment in response to what they heard after defendant slammed the door.

¶ 41 Next, defendant concedes that the police had a strong reason to believe he was on the premises. Finally, although the actual entry into defendant's apartment was not peaceable, the police forced their way into the apartment only after defendant slammed the door, and they heard children screaming and large objects being moved around. Therefore, we do not find this factor to be dispositive. Balancing all the factors, especially considering the level of violence involved in the crime and the response to the police knocking on defendant's door, we find that the officers acted reasonably based on the totality of the circumstances facing them at their time of entry. *Davis*, 398 Ill. App. 3d at 948. Given the exigent circumstances surrounding defendant's arrest, a motion to quash arrest and suppress evidence would not have been meritorious, and counsel cannot be considered ineffective for failing to file a non-meritorious motion. *People v. Anderson*, 2013 IL App (2d) 111183, ¶ 74.

¶ 42 We disagree with defendant's reliance on *Davis*, 398 Ill. App. 3d 940, as being "virtually identical" to the present case. First, *Davis* is procedurally distinguishable from the present case. The defendant in *Davis* filed a motion to suppress, received a hearing, and his motion was denied by the trial court. *Davis*, 398 Ill. App. 3d at 941, 946. In addition, the circumstances of the arrest in Davis are factually distinguishable from the present case. The evidence presented at the suppression hearing showed that the crime essentially involved defendant, his girlfriend Nicole Shatley, and another man punching the victim Stephanie Harrison through the windows of her car because she owed defendant and Shatley money for drugs. *Id.* at 941. Deputy John Willer received information from Harrison on the date of the incident, and based on that information he proceeded to Shatley's apartment. *Id.* at 942. Willer attempted to get into the building, but the

outside door was locked. *Id*. Shatley and another woman soon came out of the locked door. *Id*. When prompted, Shatley told Willer the defendant was upstairs. *Id*. The police arrested Shatley and then Willer entered the building through the door. *Id*. At the suppression hearing, Willer testified that when he was standing in the hallway outside of Shatley's apartment:

> "The door to the apartment then opened and Willer saw defendant. *** When defendant saw Willer at the door, his eyes widened, his jaw dropped, and he immediately turned and attempted to run from Willer. Defendant was able to take about half a step before Willer stepped into the apartment, grabbed him, and handcuffed him." *Id*.

¶ 43 On appeal, the defendant argued that the trial court's denial of his motion to suppress was error. *Id*. at 947. The court agreed, finding a lack of exigent circumstances existed to justify the warrantless entry into defendant's apartment. *Id*. In so finding, the court noted that while the offense for which defendant was wanted was violent, nothing in the record indicated that the offense was "particularly grave" because there was no evidence that Harrison suffered any injury, sought medical treatment, or was in any way hindered from performing normal activities. *Id*. at 949. The court concluded that although the police acted quickly and without unjustifiable delay in locating the defendant, and had probable cause, it was "not persuaded that these circumstances, without more, necessitated prompt action by the police in the form of a warrantless entry and arrest." *Id*. at 950.

¶ 44 In the present case, defendant was involved in a very violent crime that resulted in severe injury to Jotzat. At trial, Jotzat testified that as a result of the attack, he was initially paralyzed on

his left side, had to undergo multiple surgeries, and needed to have a plate put in his head. Furthermore, the Davis court said that "without more" the circumstances were not enough to necessitate prompt action, but here the circumstances included more. After defendant slammed the door and locked it in response to Detective Landando, Landando heard children "screaming and yelling" and large objects being moved around. It was reasonable for Landando to infer that defendant, who recently committed a gravely violent crime, was fleeing or possibly harming someone within the apartment. Finally, we find it worth noting that while the deputy in *Davis* forced his way into the apartment simply in response to seeing the defendant attempt to close the door, here Landando forced his way into defendant's apartment after hearing screaming children and large objects being moved. We find *Davis* is inapplicable to the instant case.

¶ 45 Nonetheless, even if the motion to suppress would have succeeded, defendant would still be unable to show that the trial outcome would have been different absent the evidence of his fleeing and hiding behind the couch.

¶ 46 The remaining evidence presented against defendant at trial was overwhelming. The testimony of a single eyewitness is sufficient to sustain a conviction. *People v. Castillo*, 372 Ill. App. 3d 11, 20 (2007) (citing *People v. Smith*, 185 Ill. 2d 532)). Here, defendant was positively identified by two eyewitnesses, Treadway and Lazo, as being the man who hit Jotzat in the head with a bat. Treadway testified that he saw defendant hit Jotzat with the bat with "momentum" and "full force," and was about five or ten feet from defendant at the time with a clear view. Lazo testified that he had looked a defendant for "a good 4 seconds" and saw him running away from the scene holding a bat. Both Treadway and Lazo identified defendant independently in a photo

array and in open court. At the time of the photo array, Treadway was one-hundred percent sure defendant was the man with the bat, although he had also been sure he correctly identified codefendant. Treadway also identified defendant in an in-person lineup. Moreover, the testimony of Treadway, Lazo, and Hernandez was substantially corroborated by Luis Ortega, as well as the eventual location of the green Ford Taurus which belonged to codefendant.

¶ 47 Defendant argues that the identification evidence was "far from being beyond reproach" and points out the inconsistencies with regard to Treadway and Lazo describing defendant's tattoos. However, "discrepancies and omissions as to physical characteristics or clothing and appearance in a physical description are not necessarily fatal, but affect the weight to be given that testimony." *People v. Romero*, 384 Ill. App. 3d 125, 133 (2008) (citing *People v. Slim*, 127 Ill. 2d 302, 308, 312 (1989)). Taking into consideration all the evidence presented at trial, we cannot conclude there is a reasonable probability that, absent evidence of defendant's flight, the outcome of the trial would have been different. Accordingly, defendant cannot show he was prejudiced by counsel's performance and he is unable to show he received ineffective assistance of counsel.

¶ 48 Defendant next contends that the circuit court erred in admitting evidence of his attempted flight to show a consciousness of guilt because there was no evidence that defendant knew he was being sought as a suspect in an attempted murder.

¶ 49 As an initial matter, defendant acknowledges that he did not properly preserve this issue for review because trial counsel failed to contemporaneously object to the testimony about defendant's flight. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (a defendant forfeits review of an issue if he fails to object at trial and raise the issue in a posttrial motion). Nonetheless,

defendant urges this court to relax the forfeiture rule.

¶ 50 First, defendant claims that the forfeiture rule should be relaxed because the issue was fully litigated below. Defendant included the issue in his posttrial motion and counsel argued the issue at the hearing on the motion. However, in support of his argument, defendant only cites to the general principle that the failure to raise claims of error before the circuit court "denies the court the opportunity to correct the error immediately and grant a new trial if one is warranted, wasting time and judicial resources." *People v. McLaurin*, 235 Ill. 2d 478, 488 (2009). Defendant has failed to present any case law suggesting that the forfeiture rule should be relaxed in this instance, and accordingly we decline to consider his argument. See Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008) (the argument section of appellant's brief "shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and pages of the record relied on").

¶ 51 Defendant next argues that the forfeiture rule should be relaxed because his trial counsel was ineffective for failing to properly preserve the error with a contemporaneous objection. As we discuss below, we find that the court did not err in admitting evidence of defendant's of flight to show a consciousness of guilt and, therefore, counsel could not have been ineffective for failing to object. See *Anderson*, 2013 IL App (2d) 111183, ¶ 74 (where the underlying motion the defendant is arguing should have been filed is not meritorious, a defendant cannot show he was prejudiced by counsel's failure to file).

¶ 52 In the alternative, defendant argues that this issue may be properly reviewed as plain error. The plain error doctrine is a limited and narrow exception to the general forfeiture rule. *People v.*

Walker, 232 Ill. 2d 113, 124 (2009). It allows a reviewing court to consider a forfeited error that was not properly preserved if: (1) a clear and obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant; or (2) a clear and obvious error occurred and the error is so serious that it affected the fairness of the defendant's trial and undermined the integrity of the judicial process. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). The defendant has the burden of persuasion under either prong and, if the defendant fails to satisfy his burden, " 'procedural default must be honored.' " *Walker*, 232 Ill. 2d at 124 (quoting *People v. Keene*, 169 Ill. 2d 1, 17 (1995)). We will first consider whether any error occurred, because "without error there can be no plain error." *People v. Smith*, 372 Ill. App. 3d 179, 181 (2007).

¶ 53 A circuit court has discretion to determine the admissibility of evidence, and its decision will not be disturbed absent an abuse of discretion. *People v. Becker*, 239 Ill. 2d 215, 234 (2010). An abuse of discretion occurs when a circuit court's ruling is "arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the circuit court." *People v. Hall*, 195 Ill. 2d 1, 20 (2000).

¶ 54 Evidence that a defendant fled, when considered in connection with all other evidence in a case, may be considered by the trier of fact as a circumstance tending to prove guilt. *People v. Lewis*, 165 Ill. 2d 305, 349 (1995). This inference of guilt depends on defendant's knowledge that an offense has been committed and that he is or may be suspected. *Lewis*, 165 Ill. 2d at 349. Although this inference requires a defendant to be aware that he was a suspect, "actual knowledge of his possible arrest is not necessary to render such evidence admissible where there is evidence

from which such fact may be inferred." *Id*. at 350.

¶ 55 Here, defendant was aware that he hit Jotzat in the head with a baseball bat in the vicinity of three of Jotzat's friends. Immediately after defendant hit Jotzat, codefendant stabbed Jotzat in the chest. Because defendant took part in a violent crime that resulted in serious injury to Jotzat with three potential eyewitnesses, it is reasonable to infer that defendant would also be aware that he might be a suspect in connection with the crime. See *People v. Griffin*, 23 Ill. App. 3d 461, 464 (1974) (where the defendant was wanted for armed robbery, and fled from a plainclothes police officer two months later, the court found the evidence of flight was proper because "when a crime has been committed on the person, as here, the other facts and circumstances in the case may be considered to draw an inference that defendant knew or should have known that he was accused or suspected of the crime"). Moreover, the arrest took place only three days after the crime was committed, and evidence of flight is generally admissible regardless of time. *Griffin*, 23 Ill. App. 3d at 463; see also *People v. Wright*, 30 Ill. 2d 519, 523 (1964) (finding that when the defendant was ordered to surrender four days after the crime was committed, introducing evidence of his flight was not in error). Where, as here, the police approached defendant only three days after a violent crime was committed in front of eyewitnesses, we cannot find the trial court's decision to admit evidence of defendant's flight from police was "arbitrary, fanciful, unreasonable," or that no reasonable person would infer that defendant had knowledge that he was a suspect in Jotzat's attack when the police knocked on his door. Under these circumstances, the circuit court did not abuse its discretion in admitting evidence of defendant's flight to show consciousness of guilt. The court did not commit error and, accordingly, defendant's claim does

not rise to the level of plain error. *Smith*, 372 Ill. App. 3d at 181.

¶ 56 The case defendant relies on in support of his argument is distinguishable. See *People v. Wilcox*, 407 Ill. App. 3d 151 (2010). The defendant in *Wilcox* was charged with three counts of first degree murder for a crime allegedly committed on November 23, 1997. *Wilcox*, 407 Ill. App. 3d at 153. In 2004, defendant was apprehended by the FBI in Nevada, at which time he presented the authorities with a false identification card. *Id*. at 157. On appeal, this court held that the evidence of defendant's flight was admitted in error, noting that there was no evidence that anyone had told the defendant he was wanted in connection with a murder. *Id*. at 170. Although the defendant had a fake identification card, the card was issued four-and-a-half years after the murder and the court concluded it did not support an inference that the defendant fled Illinois and obtained an alias to avoid arrest for the murder at issue. *Id*.

¶ 57 The defendant in *Wilcox* was apprehended seven years after the murder occurred while, in contrast, here defendant was arrested by the police only three days after he was seen by witnesses hitting Jotzat in the head with a bat. Furthermore, there was no evidence in *Wilcox* that the defendant moved out of state immediately following the crime. The defendant testified that he moved to Ohio eight days before the murder for a job, then moved to Nevada in 2000. *Id*. at 158. In the present case, defendant's flight occurred just three days after the crime was committed, when police arrived at his apartment and informed him they wanted to speak with him. We find the facts of *Wilcox* are inapplicable to the present case.

¶ 58 Moreover, even if we found the court had committed error, defendant would still not be able to show plain error because, as we discussed above, the evidence presented against defendant

at trial was not closely balanced and was overwhelming. Two witnesses, Treadway and Lazo, identified defendant as the man who hit Jotzat in the head with a bat. The testimony of Treadway, Lazo, and Hernandez was substantially corroborated by the testimony of Ortega and the location of the green Ford Taurus that belonged to codefendant. Because the evidence at defendant's trial was not so closely balanced that the alleged error threatened to tip the scales of justice against him, there is no plain error, and the issue has been forfeited.

¶ 59 Lastly, defendant contends that the trial court erred by failing to hold a preliminary *Krankel* inquiry into trial counsel's potential ineffectiveness for failing to investigate and call a potential alibi witness. Defendant claims that a letter counsel submitted to the court during the sentencing hearing from defendant's sister showed that counsel failed to call an alibi witness and therefore showed sufficient grounds to warrant a *Krankel* inquiry. Whether the circuit court erred in not conducting a Krankel inquiry is a question of law reviewed *de novo*. *People v. Moore*, 207 Ill. 2d 68, 75 (2003).

¶ 60 Generally, when a defendant is represented by counsel, a circuit court cannot consider *pro se* motions filed by the defendant. *People v. Radford*, 359 Ill. App. 3d 411, 418 (2005). However, a defendant who is represented by counsel may raise a *pro se* ineffective assistance of counsel claim as long as it is specific and supported by facts. *Id*. Under *People v. Krankel*, 102 Ill. 2d 181 (1984), when a defendant presents a *pro se* posttrial claim of ineffective assistance of counsel, the trial court must conduct an adequate inquiry into the factual basis of his claim. *Moore*, 207 Ill. 2d at 77; *Krankel*, 102 Ill. 2d at 189. If the court concludes that the claim lacks merit or pertains solely to matters of trial strategy, the court may deny the *pro se* motion. *Moore*,

207 Ill. 2d at 78. However, if the court determines the allegations show possible neglect of the case, it should appoint new counsel to represent the defendant at a hearing on the defendant's ineffectiveness claim. *Id.* The main concern for the reviewing court is whether the circuit court made an adequate inquiry into defendant's *pro se* claim of ineffective assistance of counsel. *Id.*

¶ 61 Here, however, defendant made no *pro se* posttrial claim of ineffective assistance of counsel. Defendant nonetheless argues that the trial judge should have *sua sponte* conducted a *Krankel* hearing because trial counsel's ineffectiveness was "readily apparent" from the record, relying on *People v. Williams*, 224 Ill. App. 3d 517 (1992).

¶ 62 In *Williams*, after the defendant's trial and during a hearing on defendant's posttrial motion, defense counsel presented argument about the testimony of additional witnesses that had not testified at trial who would have supported the defendant's alibi defense. *Williams*, 224 Ill. App. 3d at 521-23. Defense counsel explained that he was presenting "other information or testimony that would have been brought out at trial." *Id.* at 522. The court chided counsel, saying "[w]hat do you think, you try it once, you [lose] and you ... say wait a second, I ... got more evidence. I have never heard anything more ridiculous in my life." *Id.* On appeal, defendant admitted he had not filed a *pro se* petition or written the trial judge claiming ineffective assistance of counsel, but argued that counsel's ineffectiveness was "readily apparent" and that the trial court should have *sua sponte* conducted a *Krankel* inquiry. *Id.* at 523-24. The reviewing court observed that defense counsel presented the witnesses and stated they had been unavailable for trial, but the record was silent as to any effort defense counsel had made to present the witnesses at trial. *Id.* at 524. In addition, the court noted that "the trial judge's strong comments to counsel at the hearing

indicate that he was made aware of counsel's possible neglect." *Id*. The court then concluded that "[w]here there is a clear basis for an allegation of ineffectiveness of counsel, a defendant's failure in explicitly making such an allegation does not result in a waiver of a *Krankel* problem." *Id*.

¶ 63 The present case is factually distinguishable from *Williams*. Defense counsel himself in *Williams* presented additional witnesses after trial that would have supported defendant's alibi defense at trial and offered minimal explanation as to why he did not call them to testify at trial. *Id*. at 524. The record also showed that the court chastised defense counsel for introducing witnesses after the trial had been completed, showing that the court was clearly aware of counsel's potential ineffectiveness. *Id*. In contrast, here the court was presented with ten letters for the purposes of mitigating defendant's sentence, one in which defendant's sister stated that defendant "was at home that day of the incident that he is being accused of." Defense counsel did not point out the phrase to the court and no discussion was had between defendant, defense counsel, and the court about having defendant's sister as a witness. Therefore, there is no evidence that the court was aware of that single sentence as being anything more than a phrase in a letter presented for the purpose of mitigating defendant's sentence.

¶ 64 A single phrase in a letter from defendant's sister is simply not a "clear basis" that would require a court to *sua sponte* conduct a *Krankel* inquiry. Essentially, defendant is arguing that the circuit court should initiate an inquiry into defense counsel's possible ineffectiveness if the record shows evidence of possible neglect. Viewing the current *Krankel* law in Illinois, it becomes clear that defendant's interpretation is completely untenable.

¶ 65 For example, in *Radford*, the defendant argued on appeal that the trial court erred in failing

to conduct a *Krankel* inquiry. *Radford*, 359 Ill. App. 3d at 416. He claimed that a statement in a *pro se* letter he wrote to the trial court was sufficient to raise a claim of the ineffectiveness of counsel. *Id*. The reviewing court pointed out that "the only comment in defendant's letter that referred to his trial counsel is a remark that if his lawyer 'did a halfway good job,' then defendant would be at home with his family." *Id*. "A bald allegation that counsel rendered inadequate representation is insufficient for the trial court to consider." *Id*. at 418 (citing *People v. Milton*, 354 Ill. App. 3d 283, 292 (2004)). The court also noted that although defendant was present during the posttrial hearing when his letters were presented, where he could have raised an ineffective assistance of counsel claim before the court, he asserted no such claim. *Radford*, 359 Ill. App. 3d at 416. The court ultimately concluded that defendant's letter did not amount to a claim of ineffective assistance of counsel. *Id*. at 419.

¶ 66 Similarly, in *People v. Reed*, 197 Ill. App. 3d 610 (1990), the reviewing court found that the defendant's allegations of ineffective assistance of counsel were not properly presented to the court, and therefore determined that remand for a hearing on the defendant's ineffectiveness claim was unwarranted. *Reed*, 197 Ill. App. 3d at 612-13. In so holding, the court noted that although it did "not suggest that a *pro se* claim of ineffective trial counsel need take a specific form, we cannot expect the trial court to divine such a claim where it is not even arguably raised." *Id*. at 612. See also *People v. Gillespie*, 276 Ill. App. 3d 495, 501-02 (1995) (finding "[n]othing in *Krankel* suggests that if the issue is not raised before the trial court a duty should be placed on the trial court to raise the issue of ineffectiveness of counsel sua sponte").

¶ 67 In light of these cases, we conclude the circuit court in the instant case acted properly in

not conducting a *Krankel* inquiry based on a single phrase in a letter from defendant's sister provided for the purposes of mitigating defendant's sentence. Defendant was present at the posttrial motion hearing and had an opportunity to express any discontent he felt about counsel's representation. He chose not to do so. The letter from defendant's sister does not present a "clear basis" for an ineffective assistance of counsel claim, and we will not require the trial court to "divine such a claim where it is not even arguably raised." *Reed*, 197 Ill. App. 3d at 612.

¶ 68 For the foregoing reasons, we affirm the judgement of the circuit court.

¶ 69 Affirmed.